No. 82-1556

In The
Supreme Court of the United States
October Term, 1982

JOHN DUFFY, the Sheriff of San Diego County, California,
Petitioner,

vs.

THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA,
Respondent.

[redacted] BRIEF OF AMICUS CURIAE FOR THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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~~MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND~~ BRIEF OF AMICUS CURIAE FOR THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The County of Riverside, California, hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the County of Riverside in this case arises from the fact that it is a party to two cases presently pending in the Federal District Court, Central District of California, in which the same issue is before the court, namely, whether Indians may conduct bingo games prohibited by state and local laws on tribal land. (*Miller v. County of Riverside,* No. 83-1004 LEW; *Cabazon Band*

of Mission Indians v. County of Riverside, No. 83-1117 LEW.)

In the instant case petitioner has argued primarily that high-stakes bingo games on Indian land is contrary to the public policy of the State of California, and is thus criminal/prohibitory conduct, but has barely mentioned the right of the state, under certain circumstances, to exercise its civil/regulatory authority over Indians. It is believed that the brief which *amicus curiae* is requesting permission to file will contain a more complete argument on that issue. If this argument is accepted, it could be dispositive of this case.

This motion is being made out of an abundance of caution. Rule 36.4 of the Supreme Court Rules permits the filing of an *amicus curiae* without the necessity of consent when the brief is presented for a political subdivision of a State. Although the petitioner in the instant case is the Sheriff of the County of San Diego, the underlying relief sought by respondent was an order that the County of San Diego, through its Sheriff, could not enforce state or local laws prohibiting bingo on reservation lands. It is believed that the Sheriff stands in the shoes of the County of San Diego and that consent is not, therefore, required.

Dated: April 6, 1983.

Respectfully submitted,

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BRIEF OF THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The County of Riverside, a political subdivision of the State of California, hereby files this Brief as *Amicus Curiae* pursuant to Rule 36 of the Rules of the Supreme Court of the United States.

Interest of Amicus Curiae

The County of Riverside is a general law county located in the southern part of the State of California. Included within its boundaries are 11 Indian reservations with a total area in excess of 104,000 acres. Not all of the land contained within the reservations is contiguous; in-

stead, there are six reservations which are composed of alternate sections of land arranged in a pattern of checkerboard jurisdiction.

The County of Riverside has a vital interest in the issues raised in the decision of the Ninth Circuit Court of Appeals in *The Barona Group of the Capitan Grande Band of Mission Indians v. Duffy* (9th Cir. 1982) 694 F. 2d 1185, because the decision, in effect, precludes the application of state and local law to the playing of bingo in Indian Country despite the fact that the public policy of California prohibits gambling and only allows the playing of bingo under stringent controls by certain charitable organizations. The County of Riverside is currently litigating its right to enforce state and local laws against gambling and bingo on Indian reservations. (*Miller v. County of Riverside,* No. 83-1004 LEW (C. D. Cal.) [questioning whether individual Indian may conduct bingo on allotted land for profit]; *Cabazon Band of Mission Indians v. County of Riverside,* No. 83-1117 LEW (C. D. Cal.) [questioning whether local ordinances apply to Indian casinos and bingo operations].

For the reasons explained herein, the County of Riverside is vitally interested in whether Indian tribes may, contrary to the expressed public policy of the State of California, operate bingo games on the reservations. The County of Riverside submits this brief *amicus curiae* for the purpose of urging the Court to grant the Petition for Writ of Certiorari of the Sheriff of the County of San Diego and to reverse the decision of the Ninth Circuit Court of Appeals.

———o———

INTRODUCTION

The issue of to what extent Indians are subject to the prohibitions against gambling promulgated by state and local governments has engendered considerable national controversy. The instant case is but one reflection of an ever increasingly growing pool of problems.

It has been estimated that about 100 of the approximately 283 Indian tribes in the United States are presently, or are seriously considering, operating some form of reservation bingo. The Riverside Office of the Bureau of Indian Affairs has indicated that at least ten reservations in Southern California alone, and primarily in Riverside and San Diego County, have expressed strong interest in opening up bingo parlors. Indian bingo is also being actively conducted in Maine, Washington and Arizona as well as other states.

In Arizona, the state legislature responded to the Indians' defiance of its laws by introducing a bill which would bar non-Indians from collecting large cash prizes offered at reservation games. We understand that the bill has passed the House and is now before the Senate.

In Washington, the United States Attorney successfully obtained an injunction against the Lummi Tribe as to their operation of various gambling games contrary to the laws of the State of Washington. (*United States v. Lummi Indian Tribe*, No. C-83-94-C (W. D. Wash.).)

The decision of the Ninth Circuit in the *Barona* case, which not only misinterprets the public policy of the State of California but takes away the regulatory authority of the state, only exacerbates the tension of the situation.

We believe that the present case is of sufficient importance to the entire problem that the Petition for Writ of Certiorari should be granted.

———o———

REASONS FOR GRANTING THE WRIT

A.

California Penal Code Section 326.5 is a criminal/prohibitory statute and is, therefore, enforceable on Indian Reservations against both Indians and Non-Indians.

Bingo has long been prohibited in California, both constitutionally as well as statutorily. (See California Constitution Art. IV, § 19 (a) and former Art. IV, § 26; California Penal Code §§ 319 through 326; 60 Ops. Cal. Atty. Gen. 130, 131 (1977).) And the 1976 amendment to the California Constitution which permitted the Legislature by statute to authorize cities and counties to allow bingo games for charitable purposes only did not reflect a change in the state's public policy towards bingo. (California Constitution Art. IV, § 19 (c); Penal Code § 326.5.)

Shortly after the adoption of that amendment, the California Attorney General was asked whether Penal Code § 326.5 supersedes the provisions of Penal Code §§ 319 through 326 (prohibiting lotteries) as to any bingo game authorized by Penal Code § 326.5 and as to any bingo game not authorized by Penal Code § 326.5. The Attorney General concluded that:

> By its own terms, Penal Code section 326.5 thus specifically supersedes the application of Penal Code sections 319 through 326 as to any authorized bingo games. It does not, however, purport to limit, either expressly or impliedly, the anti-lottery provisions of Penal Code sections 319 through 326 as to any unauthorized game.
>
> [ ] Based upon the foregoing, it is apparent that if the three elements of a lottery are present, *one who operates a bingo game not authorized by Penal Code section 326.5 is subject to prosecution under the laws prohibiting lotteries.*" (See 60 Ops. Cal. Atty. Gen. 130, 132 (1977); emphasis added.)

The opinion of the California Attorney General that any bingo game not conducted in accordance with Penal Code § 326.5 was *expressly prohibited* was apparently unknown to the Ninth Circuit, especially since the Court concluded that the proposed operation was consistent with the "permissive interest" of the statute. To the contrary, it is prohibited by California's anti-lottery laws. In fact, it is quite surprising that in analyzing the public policy of the State of California, the Court did not cite or rely on any cases arising out of the State nor did it undertake any analyses of the history of California's Legislative and Constitutional prohibition of bingo. Instead, the Ninth Circuit found the analysis of *Seminole Tribe of Florida v. Butterworth* (5th Cir. 1981) 658 F. 2d 310 *cert. den.* 455 U. S. 1020 persuasive, even though that case was based on a review of the public policy of the State of Florida.

In *Butterworth,* a 2-1 split decision, after noting that the Florida bingo statute as originally enacted had contained no penal sanctions and that the Florida Supreme Court had decided that bingo was not a prohibited activity

but only one which the state could regulate, the Fifth Circuit concluded that bingo in Florida "appears to fall in a category of gambling that the state has chosen to regulate by imposing certain limitations to avoid abuses." (*Butterworth,* supra, p. 314.) While that may accurately state the public policy of the State of Florida relative to bingo and gambling, history has shown that the public policy of the State of California is often quite different. For example, in *United States v. Farris* (9th Cir. 1980) 624 F. 2d 890 *cert. den.* 449 U. S. 1111 (1981), the Ninth Circuit recognized that 18 U. S. C. § 1955, which prohibits illegal gambling businesses, while applicable to California, had been specifically written so that it would not affect the gambling businesses of Nevada and Florida.

Clearly the public policy of California is, and has always been, that bingo is a prohibited activity. And, just as a statute should not be found to be criminal/prohibitory simply because it includes penal sanctions for its enforcement, neither should a statute be found to be civil-regulatory simply because a narrow exception is engrafted onto what is otherwise an expressly prohibitory statute.

In California, Penal Code § 326.5 is little more than a narrow exception to a clearly prohibitory statute, and emphasizes the public policy of the state that bingo is not to be a money-making venture.[1]

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[1]One can get a feel for the magnitude of the potential profits involved from a review of the financial statements submitted by the Seminole Tribe for one of their three bingo operations for the seven months ending December 31, 1982. The reports were submitted at a "Gambling Operations" conference for Indians sponsored by Management Concepts Incorporated which was held in Las Vegas, Nevada, on March 28-30, 1983. The total net profit reported for the period for bingo alone was $2,199,400.58 of which the profit for the management company was $955,720.80.

B.

The Ninth Circuit Opinion effectively deprives California, a Public Law 280 state, of that regulatory authority over Indians enjoyed by non-Public Law 280 states.

Even if it could be concluded that Penal Code § 326.5 is civil/regulatory as opposed to criminal/prohibitory, the *Barona* decision fails to analyze or even consider the right of California under its plenary power to enforce its regulatory authority over tribal members or reservation activities. The effect of this omission is that California, a Public Law 280 state, finds itself with less regulatory authority over Indians than that enjoyed by non-Public Law 280 states.

Early in *Barona,* the Ninth Circuit states that because of *Bryan v. Itasca County* (1976) 426 U. S. 373, "a state may not impose general civil/regulatory laws on the reservation". (*Barona,* supra, p. 1188.) A similar statement was made by the Fifth Circuit in *Seminole Tribe of Florida v. Butterworth* (5th Cir. 1981) 658 F. 2d 310, 311 *cert. den.* 455 U. S. 1020. And, once the *Barona* court found that Penal Code § 326.5 was only civil/regulatory, it concluded, without further analysis, that the Indians were not subject in any respect to state law and could conduct their bingo games any way they chose.

But this Court has repeatedly held that the states *do* have regulatory authority over tribal members and of reservation activities *unless* the exercise of state authority has been pre-empted by federal law or it would interfere with the tribe's ability to exercise its sovereign func-

tions. (*Ramah Navajo Sch. Bd. v. Bureau of Revenue* (1982) 102 S. Ct. 3394, citing *White Mountain Apache Tribe v. Bracker* (1980) 448 U. S. 136; *McClanahan v. Arizona State Tax Comm'n* (1973) 411 U. S. 164; *Williams v. Lee* (1959) 358 U. S. 217.) Although Public Law 280 may not have increased a state's civil jurisdiction over Indians to the extent that it initially appeared to, it seems quite unlikely that Congress' attempt to confer additional civil and criminal jurisdiction to certain states over Indians in reality deprived states, like California, of the regulatory authority it already possessed. Public Law 280 was intended as a grant of jurisdiction and was not intended to be a prohibition on the exercise of jurisdiction that a state would otherwise possess. (*People of South Naknek v. Bristol Bay Borough* (D. C. Alaska 1979) 466 F. Supp. 870.)

In other words, once the *Barona* court determined that Penal Code § 326.5 was civil/regulatory, it should have analyzed whether California's regulatory scheme was preempted by federal law or whether it interfered with the tribe's ability to exercise its sovereign functions. Presumably, had this been a non-Public Law 280 state, such an analysis would have been the heart of the opinion.

It seems clear that had this analysis been undertaken here, there is a strong likelihood that California's regulatory authority as to bingo would have been upheld. We are unaware of any relevant federal statutes or laws which would suggest that Congress had either explicitly or impliedly announced its intention to pre-empt this state activity. If anything, a review of relevant federal law suggests Congress' intent to assimilate state law in this regard. In 18 U. S. C. § 1955, illegal gambling under the

laws of the state or its political subdivision constitutes a violation of federal law. Similarly, under the RICO Act (Racketeer Influenced and Corrupt Organizations), 18 U. S. C. § 1961 *et seq.*, a violation of the gambling laws of any state or its political subdivision is prohibited under federal law. Moreover, we do not see the Indians' aim of generating substantial profits from non-Indian players at high-stakes bingo games as an inherent attribute of the tribe's exercise of its sovereign functions. Gambling simply cannot be construed as an "internal tribal matter," regardless of how the profits are used, or the fact that the tribal council controls the game.

California clearly has a significant interest in exercising its regulatory authority over bingo games which are not conducted pursuant to the very stringent requirements of Penal Code § 326.5. Bingo is prohibited in California in large part because of the fear that the very nature of the game, if allowed to be played for high stakes, will result in the take over of legitimate enterprises by organized crime.

Thus, an examination of the relevant state, federal and tribal interests would likely find that California's exercise of its regulatory authority over tribal members and reservation activities is appropriate under *Ramah Navajo*. The failure of the *Barona* court to consider this aspect of the case effectively deprives California of the same regulatory authority over Indians enjoyed by non-Public Law 280 states.

CONCLUSION

Amicus County of Riverside believes that the *Barona* case should be reviewed by this Court because of the pro-

found effect it will have on California as well as all Public Law 280 states.

The *Barona* case will have a significant effect on California because of its conclusion that Penal Code § 326.5 is civil/regulatory and not criminal/prohibitory. Such a conclusion is directly contrary to the history of California public policy relative to bingo, the language of the statute, and the interpretation of the statute given to it by the California Attorney General.

The *Barona* case will also have a significant effect on all Public Law 280 states because of its refusal to analyze the relevant state, federal and tribal interests involved to determine whether California has a legitimate interest in exercising its regulatory authority over bingo games on Indian reservations. The omission of such analysis effectively deprives Public Law 280 states of the same regulatory authority enjoyed by non-Public Law 280 states over Indians and reservation activities.

For both of these reasons and each of them, the County of Riverside prays that the Petition for Writ of Certiorari filed by the County of San Diego and the Sheriff of the County of San Diego, will be granted.

Respectfully submitted,

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